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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1720

JAMES BOB IMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the admissibility of evidence of prior similar acts and the sufficiency of the evidence.

Following a second jury trial[1] in the United States District Court for the Eastern District of Texas, petitioner was convicted on two counts of a three-count indictment charging the transportation, receipt and concealment of a stolen motor vehicle in interstate commerce knowing it to have been stolen, in violation of 18 U.S.C. 2312 and 2313. He was sentenced to five years' imprisonment on each count, the sentences to

[1] The first trial ended in a mistrial.

run concurrently. The court of appeals affirmed (490 F. 2d 1372; Pet. App. A, pp. A1–A14).

The evidence is detailed in the opinion of the court of appeals. Briefly, it shows that on July 15, 1970, a front-end loader, model 645, serial number 24S02984, transmission number 26624, axle number 3–70–0006 was purchased by and subsequently shipped to Road Machinery, Inc., of Doraville, Georgia, from Allis-Chalmers Manufacturing Company of Deerfield, Illinois. On October 12, 1970, an Allis-Chalmers front-end loader, model 645, was discovered missing from the Road Machinery plant at Macon, Georgia, and fresh wheel marks indicated that the vehicle had been driven from the front yard area where it had been parked. The police were notified.

Sometime in March or April 1971, petitioner and co-defendant Bryant hauled a front-end loader, model 645, on a truck to the property of James Graham in the vicinity of Branch, Texas, for repairs to be performed by Graham. Petitioner drove the truck and Bryant was a passenger. Both men attempted to unload the vehicle but were unable to do so without help. Graham telephoned a wrecker service for assistance. A mechanic arrived, helped to accomplish the unloading, and was paid by Bryant, who later testified that he had been furnished the money by petitioner. The loader was eventually repaired and plans were made to pick it up.

On May 12, 1971, petitioner rented a tractor-trailer, hired a driver, one Clifton Forrest, and together with Bryant and Forrest secured the front-end loader to the trailer in preparation for a trip to Sulphur

Spring, Texas. With Bryant riding in the passenger seat, Forrest began to drive the tractor-trailer; petitioner followed in a Lincoln Continental. The tractor-trailer was stopped in McKinney, Texas, for pulling a trailer which lacked the requisite motor vehicle inspection certificate and which was carrying an excessive load. Minutes prior to this stop, the same highway patrolman had stopped the Lincoln Continental driven by petitioner. The front-end loader secured to the trailer was later determined to have the same transmission and axle numbers as those on the vehicle sold to Road Machinery in July 1970. The serial number on the front-end loader, however, had been removed. Petitioner and co-defendant Bryant were subsequently arrested.

Over petitioner's objection at trial, evidence was admitted that on or about December 12, 1970, a backhoe (a heavy tractor) was stolen from the B&D Company in Dallas, Texas. In late December 1970 or early January 1971, petitioner telephoned Graham that he had a backhoe that he wanted to sell. Graham contacted a prospective buyer and arranged a meeting between the prospective buyer and petitioner at a cafe in McKinney, Texas. The buyer, petitioner, Graham and Bryant met at the cafe and then went to the place where the backhoe was parked, about three miles from McKinney. After this meeting, petitioner drove the truck-trailer on which the backhoe was loaded to the buyer's place of business. Negotiations for the sale subsequently were completed, and the buyer took possession of the backhoe. In May 1971 the backhoe was identified by its rightful owner as the one stolen from

the B&D Company. This evidence was admitted by the district court for the limited purpose of showing the state of mind and intent of petitioner and his co-defendant, and the court so instructed the jury.

1. Petitioner contends that evidence of prior similar acts (relating to the stolen backhoe) was improperly admitted against him at trial.

Evidence of criminal conduct for which a defendant is not then on trial is, of course, not admissible merely to show his disposition to commit crime. But when the evidence is relevant to any of the issues properly before the jury, its prejudicial effect may be outweighed by its probative value, in which case it may be admitted at the discretion of the trial judge. Among such issues are motive, knowledge or state of mind, intent, absence of mistake or accident, identity, and common scheme or plan embracing the commission of two or more criminal acts so interrelated that proof of one tends naturally to establish the others. See McCormick, *Evidence* § 190 (1972). If the testimony is relevant on any of those issues, the mere fact that it may tend to prove the commission of another offense does not make it inadmissible. See, *e.g.*, *Moore* v. *United States*, 150 U.S. 57. Nor does the fact that, incidentally, it may injuriously affect the character of the accused with the jury. *Bracey* v. *United States*, 142 F. 2d 85, 89–90 (C.A.D.C.). When, as here, there is no question about the accused's presence and opportunity to commit the offense but there may be some question about his knowledge, state of mind, or intent, evidence of other similar crimes is particularly probative because it "is likely to be substantially and di-

rectly material to the issue of whether defendant committed the criminal act." *United States* v. *Bobbitt*, 450 F. 2d 685, 690 (C.A.D.C.). The court of appeals applied these principles to the facts of this case, and we rely on the following portion of its opinion (490 F. 2d at 1377–1378; Pet. App. A, pp. A10–A11):

> Generally the admission of prior acts of misconduct of a defendant is not permitted. However, we have long subscribed to the exception to that rule which permits the introduction of proof of prior acts to establish knowledge or intent where such an element is an essential element of the offense charged, such prior acts are similar, and are not too remote in time from the offense charged. *Weiss* v. *United States*, 5 Cir., 1941, 122 F. 2d 675; *Gilstrap* v. *United States*, 5 Cir., 1968, 389 F. 2d 6.
>
> We stressed the necessity for similarity of extraneous offenses in *United States* v. *Broadway*, *supra* [477 F. 2d 991]. However, the similarity contemplated by the exception is a matter of relevancy and is "judged by the degree in which the prior acts approaches near identity with the elements of the offense charge. There is no necessity for synonymity but there must be substantial relevancy for purposes other than to show the probability that the person committed the offense being tried because he is a man of criminal character." *United States* v. *Kasouris*, 5 Cir., 1973, 474 F. 2d 689, 692. *See also United States* v. *Mancuso*, 5 Cir., 1970, 423 F. 2d 23, in which we found the nature of nine prior offenses involving either forgery or false pretense similar to a Dyer Act offense with which defendant was charged, and upheld the introduction in evidence of those

> offenses for the limited purpose of showing intent.
>
> We have no difficulty here in finding similarity between the prior acts and the offenses charged. The backhoe and front-end loader road tractors are both characterized as heavy equipment. They were both determined to be missing at approximately the same time. It is apparent that the testimony regarding the missing backhoe bore heavily on the question of criminal intent, an element necessary for the Government to establish under each count of the indictment, and we find no infirmity in its admission in evidence.

We note also the lack of merit in petitioner's contention that the trial court abused its discretion by admitting evidence of other crimes because such evidence was not critical to the establishment of an element of the crime of which he was accused.[2] This

[2] Petitioner relies upon a portion of the dissent in *United States* v. *Baldivid*, 465 F. 2d 1277 (C.A. 4), certiorari denied, 409 U.S. 1047, which, abandoning the relevancy doctrine for a rule of necessity, states that, although evidence of prior crimes is admissible if it establishes intent by clarifying otherwise ambiguous activity, such evidence should not be admissible to establish intent where intent is not specifically disputed or is merely a technical element of the crime (465 F. 2d at 1282–1290). See also *United States* v. *Byrd*, 352 F. 2d 570, 575 (C.A. 2), and dictum in *Harper* v. *United States*, 239 F. 2d 945 (C.A.D.C.), upon which petitioner relies. However, since the government bears the burden of proof beyond a reasonable doubt on every element of the offense charged, we would oppose the formulation of a rule that would exclude otherwise probative evidence simply because a reviewing court might say it was not "necessary" in the absence of affirmative contravention of that element by the defendant.

Court has held that evidence of other criminal acts is admissible so long as the evidence is substantially relevant for some purpose other than to show that the accused committed the crime in question because he is a man of criminal character. See *Jones* v. *United States*, 258 U.S. 40; *Nye & Nissen* v. *United States*, 336 U.S. 613. Relevancy is established if the evidence of other crimes tends either to prove an element of the crime directly or to corroborate or support admitted direct evidence. See *Nye & Nissen* v. *United States*, *supra*; *Swann* v. *United States*, 195 F. 2d 689 (C.A. 4); *Schwartz* v. *United States*, 160 F. 2d 718 (C.A. 9). The evidence of the similar act by petitioner—that he sold a backhoe which had been stolen in McKinney, Texas, and used Graham as his contact for the sale—tended to show petitioner's intent and state of mind or knowledge that the front-end loader was in fact stolen. In these circumstances, and particularly in light of the trial court's limiting instructions to the jury, the court of appeals properly concluded that the trial court did not abuse its discretion by the admission of this relevant evidence.

Petitioner's reliance upon *Michelson* v. *United States*, 335 U.S. 469, and *Johnson* v. *United States*, 318 U.S. 189, is misplaced. Although this Court in *Michelson* stated as a general proposition that "the whole matter of character, disposition and reputation" is foreclosed to the prosecutor in his "case-in-chief" and that he may not show "defendant's prior trouble with the law" or "specific criminal acts" (335 U.S. at 475), language upon which petitioner relies (Pet. 7), the statement is qualified by the Court's recogni-

tion of "well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent intent as an element of the crime charged" (335 U.S. at 475–476, n. 8). As for *Johnson,* the Court there held that it was proper to inquire into a collateral crime unconnected with the offense charged where such inquiry was "relevant to the issue in the case * * * to show the continuous nature of the transactions in question" (318 U.S. at 195–196). The Court's statement that "[t]he case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying * * * are of course vastly different" (*id.* at 195) refers to the issue whether the defendant waived his privilege under the Fifth Amendment, not, as petitioner contends (Pet. 7–8), to the issue whether the prosecution may in its case-in-chief introduce prior similar acts.

Nor are *United States* v. *Harrington,* 490 F. 2d 487 (C.A. 2); *United States* v. *Mills,* 440 F. 2d 647 (C.A. 6), certiorari denied, 404 U.S. 837; *United States* v. *Fierson,* 419 F. 2d 1020 (C.A. 7); and *King* v. *United States,* 402 F. 2d 289 (C.A. 10), in conflict with the decision below, as petitioner claims. In *Harrington,* the court held that the introduction of mug shots of a defendant who did not take the stand deprived him of a fair trial since the photographs could "well be equivalent to the introduction of direct evidence of a prior criminal conviction" (490 F. 2d at 490). There was no showing that the prior crimes evidence thus indirectly introduced was relevant to an issue properly before the jury, as it is in this case. In *Mills* and

Jones, evidence of prior criminal acts was held properly admitted not only as permissible cross-examination of the defendants but also as relevant to prove defendants' knowledge and intent. In *Fierson*, the court held that where intent and wilfulness are not material elements of the offense charged and where the defendant does not take the stand, it is error to admit evidence of prior similar acts. Unlike the situation in *Fierson*, however, it was incumbent upon the government in this case to prove that petitioner transported the front-end loader "knowing" that it had been stolen. In *King*, the court held that evidence that defendant had shared the proceeds of a forged check endorsed by a co-defendant was admissible to prove knowledge and intent on the charge of aiding and abetting the co-defendant in forging another check. Thus, the cases relied upon by petitioner do not support his conclusion that the court below applied a standard of admissibility of prior similar acts contrary to that applied in other circuits.[3]

[3] Petitioner's reliance upon the Fifth Circuit's earlier opinion in *United States* v. *Broadway*, 477 F. 2d 991 (C.A. 5), also is misplaced. The holding in *Broadway* was "simply that when proof of an assertedly similar offense is tendered to establish necessary intent, the other offense proved must include the essential physical elements of the offense charged, and these physical elements, but not the mental ingredients of the offenses must be clearly shown by competent evidence" (477 F. 2d at 995; footnote omitted). Here the physical elements of the offense were "clearly shown by competent evidence." Moreover, as the court of appeals stated in its opinion here in reference to the *Broadway* case (490 F. 2d at 1377; Pet. App. A, p. A10):

"Appellants contend that there was a fatal flaw in the backhoe evidence inasmuch as that vehicle had moved only in *intra-*

2. Petitioner's additional contention that the evidence was insufficient to establish the identity of the stolen vehicle is answered in the following portion of the court of appeals opinion upon which we rely (490 F. 2d at 1375; Pet. App. A, p. A6):

> In order to sustain a conviction under the pertinent statutes the stolen vehicle and the vehicle found in possession of the accused must be identical. While there must be some evidence of common characteristics other than color, make and model of the vehicle, in order to establish proof, identity of the engine serial number is not required. *United States* v. *Johnson*, 5 Cir., 1969, 413 F. 2d 1396; *Watkins* v. *United States*, 5 Cir., 1969, 409 F. 2d 1382. The Government's evidence showed that in the place where the engine serial number plate would

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state commerce within the State of Texas, whereas *interstate* commerce is a crucial element of a prosecution under the pertinent statutes, citing *United States* v. *Broadway*, 5 Cir., 1973, 477 F. 2d 991. In *Broadway* there was a lack of similarity between mere endorsement of forged money orders and endorsement plus cashing of forged money orders. The latter offense was the offense charged and cashing or uttering was necessary to put the money orders in the flow of interstate commerce, an essential element for conviction. Without the element of transportation the prior acts constituted no offense, state or federal. In the instant case, the prior act of defendants required no additional element of interstate transportation to constitute an offense, although a state offense. The decision in *Broadway* is based on its peculiar facts. There 'the government's direct proof was slim' on the issues of intent and guilty knowledge, 477 F. 2d at 994, and the other offenses were 'offered to shore up a weak case as to intent and guilty knowledge.' 477 F. 2d at 995. This is not true in the present case, and although Impson appears to have been the spokesman and leader, the evidence is nonetheless conclusive that Bryant, as well as Impson, knew that the equipment was stolen."

normally be affixed there were instead four holes and that the number plate is easily removable with a screwdriver or tin snips, as are the axle and transmission number plates. The axle serial number plate is affixed to the rear face of the main housing and is accessible only by crawling beneath the vehicle; the transmission serial number plate is similarly affixed to the lower outside face of the transmission. Although the serial number plates could conceivably be interchanged, this is not probable; it would result in damage to the light aluminum plates which are fastened by metal drive screws that tap themselves as they are driven in. A jury could reasonably have concluded that the less accessible, less obviously placed axle and transmission number plates were inadvertently overlooked by the person or persons who removed the engine serial plate. The make and model as well as the axle and transmission numbers of the recovered vehicle were identical to those of the stolen vehicle. Under the circumstances, we consider this ample proof of identity.

In both *Watkins* v. *United States,* 409 F. 2d 1382 (C.A. 5), certiorari denied, 396 U.S. 975, and *United States* v. *Johnson,* 413 F. 2d 1396 (C.A. 5), cases upon which petitioner relies, the government proved only that a car of the same make, color and design as that in possession of the defendant had been stolen. In *Watkins,* the court noted its agreement with the government that proof of identification by serial number is not essential to a Dyer Act case but stated that "[t]here must be *some evidence* of common characteristics other than color, make, and model of the auto-

mobile in order to establish its identity" (409 F. 2d at 1386; emphasis in original). Here, the government proved that a front-end loader found in the possession of petitioner was of the same make and bore the same axle and transmission serial numbers as a vehicle which had been shipped from a manufacturing company to Road Machinery, Inc., a company which reported a front-end loader as stolen. There was thus ample identification of the stolen property.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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